No. 93-1883

Supreme Court, U.S.
FILED
JUN 15 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELOISE ANDERSON, in Her Official Capacity as Director of the California Department of Social Services and RUSSELL GOULD in His Capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, FLORIDA, HAWAII, MONTANA, NEW JERSEY, NORTH CAROLINA, OREGON AND RHODE ISLAND AND THE TERRITORY OF GUAM SUPPORTING PETITIONERS

FRANKIE SUE DEL PAPA, ESQ.
Attorney General of the State of Nevada

JOHN ALBRECHT,* Nevada Bar No. 4504
Deputy Attorney General
198 S. Carson Street
Carson City, Nevada 89701
Telephone: (702) 687-5024

Attorneys for Amicus Curiae
*Counsel of Record

[Additional Counsel listed on inside cover]

ROBERT A. BUTTERWORTH, *Attorney General*
State of Florida
The Capitol
Tallahassee, Florida 32399-1050

ROBERT A. MARKS, *Attorney General*
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

JOSEPH P. MAZUREK, *Attorney General*
State of Montana
Justice Building
P.O. Box 201401
Helena, Montana 59620-1401

DEBORAH T. PORITZ, *Attorney General*
State of New Jersey
Richard J. Hughes Justice Complex
CN 116
Trenton, New Jersey 08625-0116

MICHAEL F. EASLEY, *Attorney General*
State of North Carolina
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629

THEODORE R. KULONGOSKI, *Attorney General*
State of Oregon
100 Justice Building
Salem, Oregon 97310

JEFFREY B. PINE, *Attorney General*
The State of Rhode Island
72 Pine Street
Providence, Rhode Island 02903

ELIZABETH BARRETT-ANDERSON, *Attorney General*
Territory of Guam
Suite 2-200 E, Judicial Center Building
120 W. O'Brien Drive
Agana, Guam 96910

QUESTION FOR REVIEW

Under the Aid to Families with Dependent Children ("AFDC") program, may a State assign an AFDC eligible child to the same assistance unit as a non-parent, caretaker relative and the caretaker relative's offspring who are also receiving AFDC benefits when all of them live in the same home?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
I. THE NINTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE SECOND CIRCUIT COURT OF APPEALS AND THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, A STATE COURT OF LAST RESORT. THIS DECISION LIMITS STATE AUTHORITY TO IMPLEMENT THE AFDC PROGRAM AND REQUIRES SUBSTANTIALLY HIGHER STATE EXPENDITURES.....	4
II. STATES MAY ASSIGN ELIGIBLE CHILDREN TO ONE ASSISTANCE UNIT WITH THEIR CARETAKER RELATIVE AND ELIGIBLE OFFSPRING. THE CALIFORNIA REGULATION DOES NOT VIOLATE FEDERAL REGULATIONS.....	13
A. CALIFORNIA REGULATION MPP § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.20 (A)(2)(viii).....	15
B. THE CALIFORNIA REGULATION DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.90(A)(1).....	21

TABLE OF CONTENTS
(Continued)

Page

III. THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES INTERPRETS FEDERAL REGULATIONS TO PERMIT THE CALIFORNIA REGULATION..... 25

IV. THE AFDC PROGRAM IS AN EXAMPLE OF COOPERATIVE FEDERALISM; UNLESS SPECIFICALLY PROHIBITED BY FEDERAL LAW, STATES SHOULD HAVE GREAT ABILITY TO SET WELFARE POLICY..... 26

CONCLUSION..... 29

TABLE OF AUTHORITIES

CASES **PAGE**

Adams v. Griepentrog, U.S.D.C. Nev. # CV-S-90-451 1

Allen v. Hettleman, 494 F. Supp. 854 (D. Md. 1980) 14

Barnes v. Cohen, 749 F.2d 1009 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126 22

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) 1, 2, 4, 6, 8, 9, 11, 12, 14, 26, 28

Bowen v. Gilliard, 483 U.S. 587, 599-600 (1987) 19

Braxton v. U.S., 500 U.S. 344, 347-348 (1991) 6

Bray v. Dowling, 1994 WL 234197 (2nd Cir. 1994) 2, 3, 5, 6, 12, 23, 26

Dandridge v. Williams, 397 U.S. 471, 478 (1970) 17, 27

Deel v. Jackson, 862 F.2d 1079, 1083 (4th Cir. 1988), *cert. denied*, 490 U.S. 1092 ..... 13, 27

Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993) 1, 2, 6, 8, 9, 11, 12, 13, 14, 26, 28

King v. Smith, 392 U.S. 309, 316 (1968) 13, 17

TABLE OF AUTHORITIES
Continued

CASES **PAGE**

MacInnes v. Com'r. of Public Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992) 2, 3, 5, 6, 12, 23, 26

Miller v. Youakim, 440 U.S. 125, 144 (1979) 25

Morrell v. Flaherty, 109 N.C.A. 628, 428 S.E.2d 492 (1993) 7

New York Dept. of Social Services v. Dublino, 413 U.S. 405, 414 (1973) 13, 26

Shea v. Vialpando, 416 U.S. 251, 253 (1974) 17

Sullivan v. Stroop, 496 U.S. 478 (1990) 6

Termini v. Califano, 611 F.2d 367, 370 (2nd Cir. 1979) 19

Wilkes v. Gomez, Case No. 93-3596 7

STATUTES

42 U.S.C. § 601 13

42 U.S.C. § 605 ..... 23, 24

42 U.S.C. §§ 601-615 13

TABLE OF AUTHORITIES
Continued

CODE OF FEDERAL REGULATIONS **PAGE**

45 C.F.R. § 206.10
(b)(5) 14

45 C.F.R. § 233.20
(a)(2)(i) 16

45 C.F.R. § 233.20 4, 14, 15
(a)(2)(viii) 16, 17, 18, 20

45 C.F.R. § 233.20
(a)(3)(ii)(D) 4, 14, 23, 24

45 C.F.R. § 233.90 4, 14, 21
(a)(1) 22, 23, 24

OTHER AUTHORITIES

Action Transmittal
No. ACF-AT-94-6 25

MPP § 82-824.1 ..... 3, 8, 14, 15

U.S. Sup. Ct. Rule 10.1 5

U.S. Sup. Ct. Rule 10.1(a) 6

INTEREST OF THE AMICI CURIAE

Nevada spends $350,000 in additional Aid to Families with Dependent Children (hereinafter "AFDC") benefits because of the lower court decision in this case, *Edwards v. Healy*, 12 F.3d 154 (9th Cir. 1993), and in *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990). Hereinafter, the rule established by these cases is referred to as the "*Beaton-Edwards* rule." Soon after the Ninth Circuit Court of Appeals decided *Beaton* the Nevada Welfare Division entered into a consent order agreeing to comply with that decision. *Adams v. Griepentrog*, U.S.D.C. Nev. # CV-S-90-451. The Nevada Welfare Division now assigns children living with a caretaker relative in the same home to a different assistance unit than the caretaker relative who is an AFDC recipient. The result is a substantially higher cost of the AFDC program to Nevada and to the

United States Department of Health and Human Services (hereinafter "HHS").

Many other States have this interest. In a survey conducted by the State of North Carolina and HHS, they found that twenty nine States have rules or policies that violate the *Beaton-Edwards* rule. In contrast, only thirteen States follow the *Beaton-Edwards* rule. Eight States implement a policy different than either of these two.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals opinions in this case and in *Beaton* conflict with the decision of the Second Circuit Court of Appeals in *Bray v. Dowling*, 1994 WL 234197 (2nd Cir. 1994). In addition, the Ninth Circuit's *Beaton-Edwards* decisions clash with the holding of the Massachusetts Supreme Judicial Council in *MacInnes v. Com'r. of Public Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992). In *Beaton* and *Edwards*, the Ninth Circuit held that federal

regulations require that states create more than one assistance unit when an AFDC eligible child lives with a non-parent, caretaker relative who has AFDC eligible offspring. In *Bray* and *MacInnes*, the Second Circuit and the Massachusetts Supreme Judicial Council held that federal regulations allow states to consolidate the eligible child, caretaker relative and offspring into one assistance unit. These conflicts create a special and important reason for the United States Supreme Court to grant certiorari in this case.

State AFDC regulations are valid unless directly and unambiguously prohibited by federal statute or regulations. The federal government allows great latitude to States which participate in programs of cooperative federalism. California regulation MPP § 82-824.1 which consolidates more than one assistance unit in the same home into one assistance unit does not directly and

unambiguously violate any federal regulations. The United States Supreme Court should grant the petition for certiorari. Upon review of the case, the Court should reverse the decision of the Ninth Circuit Court of Appeals.

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE SECOND CIRCUIT COURT OF APPEALS AND THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, A STATE COURT OF LAST RESORT. THIS DECISION LIMITS STATE AUTHORITY TO IMPLEMENT THE AFDC PROGRAM AND REQUIRES SUBSTANTIALLY HIGHER STATE EXPENDITURES.

In this case, the Ninth Circuit Court of Appeals followed its decision in *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990) and held that a California regulation defining the term "assistance unit" violated 45 C.F.R. §§ 233.20(a)(2)(viii), 233.90(a)(1), and 233.20(a)(3)(ii)(D). 913 F.2d at 704. These decisions of the Ninth Circuit Court of Appeals conflict with the holding of the United States Court of Appeals for the

Second Circuit in *Bray v. Dowling*, 1994 WL 234197 (2nd Cir. 1994) and of the Massachusetts Supreme Judicial Court, a state court of last resort, in *MacInnes v. Com'r. of Public Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992). In both *Bray* and *MacInnes* the appellate court held that a state regulation similar to the California regulation did not violate federal AFDC regulations.

U.S. Sup. Ct. Rule 10.1, describes the criteria for the United States Supreme Court granting certiorari. It states:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following ... indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort;

In this case both criteria of U.S. Sup. Ct. Rule 10.1(a) are met. The Ninth Circuit Court of Appeals' *Beaton* and *Edwards* opinions conflict with the decision of the Second Circuit Court of Appeals in *Bray v. Dowling*, 1994 WL 234197 (2nd Cir. 1994). In *Bray*, the Second Circuit Court of Appeals held that a New York State policy similar to the California regulation did not violate the federal regulations. Also, the Ninth Circuit Court of Appeals decided a federal question in conflict with the Massachusetts Supreme Judicial Council, a state court of last resort. In *MacInnes*, the Massachusetts Supreme Judicial Council held that a state statute and regulation which were similar to the California regulation did not violate any federal regulations.

Each of these conflicts creates a special and important reason for granting certiorari. *Sullivan v. Stroop*, 496 U.S. 478 (1990). In *Braxton v. U.S.*, 500 U.S.

344, 347-348 (1991) Justice Scalia wrote for a unanimous court:

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1. ... (W)e regard the task as initially and primarily ours.

Other appellate courts are considering this question. The North Carolina Supreme Court has this issue presented in *Morrell v. Flaherty*, 109 N.C.A. 628, 428 S.E.2d 492 (1993) motion for temporary stay granted, 333 N.C. 792, 430 S.E.2d 424, supersedeas allowed, 334 N.C. 165, 432 S.E. 2d 364 (1993). Also, the Eighth Circuit Court of Appeals has this question in *Wilkes v. Gomez*, Case No. 93-3596. Since the question is recurring, the Supreme Court should grant the petition for certiorari.

The dispute arises in this situation. Some children who are eligible for AFDC do

not live with their parents (hereafter, "eligible children"). Instead, they reside with a caretaker relative such as an aunt or uncle (hereafter, "caretaker relative"). In addition, the caretaker relative has offspring who are eligible for AFDC (hereafter, "eligible offspring").

In this situation, the California regulation assigns the eligible children, eligible offspring, and the caretaker relative who reside in the same home to one assistance unit. Before the *Beaton* decision, Nevada had a rule very similar to the California regulation. The California regulation in dispute is MPP § 82-824.1, which states:

> Two or more AU's [Assistance Units] in the same home shall be combined into one AU when: [t]here is only one caretaker relative.

In contrast, the *Beaton-Edwards* rule requires States to establish two assistance units in these households -- one for the

eligible children and a second one for the caretaker relative and his or her eligible offspring.

The *Beaton-Edwards* rule increases the amount of AFDC financial assistance paid to these types of households. Under the AFDC program, each assistance unit receives a basic grant. The basic grant increases incrementally for each additional person in the assistance unit. If the California regulation is followed, a household described above has one assistance unit and the amount paid to that assistance unit is increased incrementally for the additional eligible child. If the *Beaton-Edwards* rule is followed, such a household receives two basic grants: one for the assistance unit containing the eligible children and a second for the assistance unit containing the caretaker relative and his or her eligible offspring.

An example is helpful. Assume that a household contains a mother and her one eligible offspring. In Nevada, this assistance unit receives an AFDC basic grant of $229 (basic grant for a one-person assistance unit) plus approximately $60 per month for the one additional member for a total of $289. For some reason, the mother's minor nephew (the eligible child) moves into their home. Under the former Nevada rule the household's AFDC grant increases incrementally by $60 for the additional child. The household would receive the following AFDC assistance:

Grant for the Assistance Unit containing the mother plus her eligible offspring (Basic Grant plus incremental increase for one person)	$289
Incremental increase for the eligible child	60
Total received by Household	$349

The former Nevada rule is similar to the California regulation at issue in this case.

Under the *Beaton-Edwards* rule, the household receives the following AFDC assistance:

Grant for the Assistance Unit containing the mother and her eligible offspring (Basic Grant plus incremental increase for one person)	$289
Grant for the Assistance Unit containing the eligible child (Basic Grant)	229
Total received by Household	$518

The eligible child commonly enters the caretaker's household after the caretaker and the eligible offspring are already receiving AFDC. For this reason, the issue is how much the benefit grant to the household will increase. Under the California regulation, the amount to the household increases incrementally for the additional eligible child. Under the *Beaton-Edwards* rule, the amount to the household increases by the amount of a basic grant. This is because the additional eligible child is

recognized as a separate assistance unit.

Nevada spends an additional $350,000 each year in AFDC benefits under the *Beaton-Edwards* rule than it would under the California regulation. Nevada has a small population. The financial costs of the *Beaton-Edwards* rule are substantial when projected across the country. States should not be forced to allocate benefits in this way unless Congress or HHS has specifically required this expenditure.

In summary, the Ninth Circuit Court of Appeals' decision in this case directly conflicts with the decision of the Second Circuit Court of Appeals in *Bray* and the Massachusetts Supreme Judicial Council in *MacInnes*. The *Beaton-Edwards* rule infringes upon a State's authority to allocate its AFDC funds. This infringement is very expensive to the States and to the federal government. The United States Supreme Court should grant this petition for certiorari

and reverse the Ninth Circuit Court of Appeals decision in *Edwards v. Healy*.

II. STATES MAY ASSIGN ELIGIBLE CHILDREN TO ONE ASSISTANCE UNIT WITH THEIR CARETAKER RELATIVE AND ELIGIBLE OFFSPRING. THE CALIFORNIA REGULATION DOES NOT VIOLATE FEDERAL REGULATIONS.

The Aid to Families with Dependent Children program is a jointly funded program of the federal government and the States. 42 U.S.C. §§ 601-615. It is one example of "cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). States voluntarily participate in the program. 42 U.S.C. § 601. State AFDC regulations are valid unless federal law prohibits them in "direct and unambiguous" language. *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 414 (1973). As a result, state governments are allowed considerable latitude in administering the AFDC program. *Deel v. Jackson*, 862 F.2d 1079, 1083 (4th Cir. 1988), *cert. denied*, 490 U.S. 1092.

Federal law authorizes the States to grant benefits to assistance units. 45 C.F.R. § 206.10(b)(5). It does not define the composition of an assistance unit. *Allen v. Hettleman*, 494 F. Supp. 854 (D. Md. 1980).

The court in *Edwards* held that California Regulation MPP § 82-824.1 was invalid under the rule in *Beaton*. The *Edwards* opinion does not specify the federal regulations that are violated. For this reason, the *Beaton* decision must be analyzed to learn the specific federal regulations that are supposedly violated by the California regulation. The court in *Beaton* specified that the California regulation violated 45 C.F.R. § 233.20 (a)(2)(viii), 45 C.F.R. §§ 233.90(a)(1), and 233.20(a)(3)(ii)(D). 913 F. 2d at 704.

A. CALIFORNIA REGULATION MPP § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.20(a)(2)(viii).

Title 45 C.F.R. § 233.20(a) states:

> Requirements for State Plans. A State Plan for ... AFDC ... must, as specified below:
>
> > (2)(viii) Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; [Emphasis added].

The California regulation does not violate 45 C.F.R. § 233.20(a)(2)(viii) for three reasons. First, the California regulation does not affect a "need item included in the standard." Second, it does not reduce any need item included in the standard. Finally, if the California regulation is construed as reducing a need item in the standard, the reduction is not caused solely because of the presence of a non-legally responsible individual.

Addressing the first point, the California regulation does not affect a need item in the standard. The phrase, "need item included in the standard" found in 45 C.F.R. § 233.20(a)(2)(viii) refers to the standard of need which must be established by each state to participate in the AFDC program. 45 C.F.R. § 233.20(a) states, in pertinent part:

> A State Plan for ... AFDC ... must, as specified below:
>
> ...
>
> (2)(i) Specify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

The "statewide standard ... determining (a) the need of applicants and recipients" is the amount of money it takes to support a family. The "statewide standard ... determining ... (b) the amount of the assistance payment" is the percentage of the standard of need that a state is willing to pay.

These two standards are not the same thing. The standard of need "is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). The standard of benefit is the percentage of that standard of need that a State agrees to fund through the AFDC program. The United States Supreme Court recognized the existence of the standard of need and distinguished it from the standard of benefits in both *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) and *King v. Smith*, 392 U.S. 309, 334 (1968).

The California regulation does not affect the standard of need for the assistance unit. Rather, the California regulation defines who will be included in the assistance unit. For this reason, 45 C.F.R. 233.20(a)(2)(viii) does not apply to the California regulation.

Second, the California regulation does not reduce the standard of need of the household. Section 233.20(a)(2)(viii) prohibits reducing the standard of need solely because of the presence in the household of a non-legally responsible individual. The California regulation increases the level of benefit to the household incrementally rather than by the amount of a basic grant.

This situation arises when an eligible child moves into a home of a caretaker relative and eligible offspring who are receiving AFDC. Under the California regulation the level of benefit increases incrementally. It does not increase by the amount of the basic grant. This constitutes a smaller increase, but it is not a reduction of the standard of need in the assistance unit.

Third, if the court decides that this is a reduction, then California does not reduce the standard of need solely because

of a non-legally responsible individual. Under the California regulation the benefit grant is being reduced because of (1) the presence of a non-legally responsible individual; and (2) who is also a recipient of AFDC. These two conditions must be met in order to reduce the benefit amount. The reduction is not solely because of the presence in the household of a non-legally responsible individual.

Whether viewed as a smaller increase or as a reduction, the California regulation recognizes "'the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared.' *Termini v. Califano*, 611 F.2d 367, 370 (2nd Cir. 1979)." *Bowen v. Gilliard*, 483 U.S. 587, 599-600 (1987). In the AFDC program, the State provides direct financial subsidies to families in need. Absent any specific federal prohibition, the State

should be able to grant a smaller increase or reduce the subsidy to a household because it is already providing a basic grant to that household.

In summary, 45 C.F.R. § 233.20(a)(2)(viii) prohibits a state from reducing the standard of need solely because a non-legally responsible individual lives in the household. The California regulation does not affect the standard of need of these households. Second, it increases the benefit grant by a smaller amount rather than reducing the grant. Finally, if this is interpreted as a reduction, then the California regulation reduces the assistance to a household because a non-legally responsible individual lives in the household who is also receiving AFDC. The California Regulation does not violate 45 C.F.R. § 233.20(a)(2)(viii).

B. THE CALIFORNIA REGULATION DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.90(A)(1).

Title 45 C.F.R. § 233.90(a)(1) states, in pertinent part:

> Under this requirement, the inclusion in the family, or the presence in the home, of a"substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State;

Title 45 C.F.R. 233.90(a)(1) contains two prohibitions. First, the presence of a non-responsible adult in a home cannot result in a finding of ineligibility. Second, the presence of a non-responsible adult cannot result in an assumption of the availability of the non-responsible adult's income. Neither one of these prohibited situations occur under the California regulation.

First, under the California regulation the eligible child is not found ineligible

because of the presence of a non-responsible adult in the home. The child is eligible for AFDC assistance. The eligible child is merely assigned into the already existing assistance unit. The benefit grant to the assistance unit increases incrementally.

Second, the California regulation does not assume the availability of any income of the caretaker relative to the eligible child. The California regulation assumes that a portion of the benefit grant is available to the eligible child. The grant is not income within the meaning of 45 C.F.R. § 233.90(a)(1).

Federal statutes and regulations do not define the term, "income." When neither Congress in statute nor the federal agency in regulation has provided a definition of income, a state has the discretion to develop its own definition. *Barnes v. Cohen*, 749 F.2d 1009 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126. In

this situation, California has chosen to interpret the term, "income" within the meaning of 45 C.F.R. § 233.90(a)(1) to exclude an AFDC benefit grant. *Bray*.

Finally, the California regulation does not violate 45 C.F.R. § 233.20(a)(3)(ii)(D). This federal regulation states, in pertinent part,

> (I)ncome and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

In this case, the AFDC benefit grant is not income or resources within the meaning of Section 233.20(a)(3)(ii)(D). This section does not apply to the California regulation.

The Massachusetts Supreme Judicial Council took a different approach when interpreting this regulation. In *MacInnes* it held that 42 U.S.C. § 605 created an obligation under federal law for the

caretaker relative to use the entire grant for the benefit of everyone in the assistance unit including an eligible child. It found that the benefit grant was income or resources within the meaning of 45 C.F.R. § 233.20(a)(3)(ii)(D) and that 42 U.S.C. § 605 made it available to each member of the assistance unit.

In conclusion, the California regulation does not violate 45 C.F.R. 233.90 (a)(1) or 233.20(a)(3)(ii)(D). The presence of the caretaker relative does not result in the finding of ineligibility because the eligible child in fact receives AFDC assistance. Also, the presence of the caretaker relative does not assume the availability of income because the AFDC benefit grant is not income within the meaning of the federal regulation. Finally, if the caretaker relative's AFDC grant is considered income, federal law creates the legal obligation of the caretaker to spend

the benefit on the eligible child.

III. THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES INTERPRETS FEDERAL REGULATIONS TO PERMIT THE CALIFORNIA REGULATION.

"'[T]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute.'" (citation omitted) *Miller v. Youakim*, 440 U.S. 125, 144 (1979). In this case, HHS interprets federal regulations as authorizing the California regulation.

On March 16, 1994, the Office of Family Assistance of the Administration for Children and Families of HHS issued Action Transmittal No. ACF-AT-94-6. Appendix 33-43 to Petition for Certiorari. The Action Transmittal states:

> "... States are authorized to set the Statewide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units." Appendix A, Page 2, Paragraph 4.

This Action Transmittal clearly states that HHS holds the opinion that the California regulation is not prohibited by federal statutes or regulations. The federal courts will consider this opinion a substantial factor in interpreting federal regulations. The California regulation is not directly and unambiguously prohibited by federal law.

IV. THE AFDC PROGRAM IS AN EXAMPLE OF COOPERATIVE FEDERALISM; UNLESS SPECIFICALLY PROHIBITED BY FEDERAL LAW, STATES SHOULD HAVE GREAT ABILITY TO SET WELFARE POLICY.

The federal courts should not lightly interfere with a state's allocation of limited welfare funds. *Dublino*, 413 U.S. at 413. Under the *MacInnes* or *Bray* rule, States may choose to establish one or more assistance units in these households. In contrast, the *Beaton-Edwards* rule requires more than one assistance units in these homes.

The policy being implemented by cooperative federalism is that State governments working with the federal government should be given wide latitude to solve society's welfare problems. *Deel v. Jackson*, 862 F.2d 1079, 1083 (4th Cir. 1988), *cert. denied*, 490 U.S. 1092. Giving States the power to choose whether one or more assistance units exist in a home is consistent with the policy of wide latitude. Requiring States to establish two assistance units and pay additional funds to that household contradicts that policy.

The United States Supreme Court described this principle in *Dandridge v. Williams*, 397 U.S. 471, 478 (1970):

> In *King v. Smith, supra*, we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' [King v. Smith, 392 U.S.] at 334. ... and noted carefully that "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set

> its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.

The *Beaton-Edwards* rule defines an assistance unit, and in doing so, sets the level of benefits. By requiring States to establish two assistance units in these households, the federal courts are defining the level of benefit for them. In effect, the federal courts doubled the basic grant for these households.

If this court grants the petition for certiorari and reverses the *Beaton-Edwards* rule, States will not be limited to recognizing only one assistance unit in these households. Rather, States will have the opportunity to experiment and choose whether to establish one assistance unit or two assistance units in these households. The ability of the States to choose is favored by the AFDC statute. Each State will make a policy choice rather than the federal courts making that choice for them.

CONCLUSION

The United States Supreme Court should grant the petition for certiorari and reverse the decision of the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals has decided a federal question in conflict with the Second Circuit Court of Appeals and the Supreme Judicial Council of Massachusetts.

Dated: June 15, 1994.

Respectfully submitted,

Frankie Sue Del Papa, Esq.
Attorney General of the
State of Nevada

*John Albrecht
Deputy Attorney General
Attorneys for Amicus Curiae
State of Nevada

*Counsel of Record

[Other Counsel of Record
Listed on Inside Cover]